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No. 333-336

In the Supreme Court of the United States

October Term, 1947

ERIC VON PATZOLL, DEE GARLAND BRANDON, GENE LUTHER FEEZELL AND JAMES H. EVANS,
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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VS.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Eric Von Patzoll, Dee Garland Brandon, Gene Luther Feezell and James H. Evans, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered herein on the 9th day of July, 1947, affirming the judgment of the United States District Court for the Western District of Oklahoma.

OPINION BELOW

The opinion of the Circuit Court of Appeals appears in the record. (R. 47-56). The judgments and sentences of the District Court are likewise in the record. (R. 8-12 incl).

JURISDICTION

The decision of the Circuit Court of Appeals, here sought to be reviewed, was entered July 9, 1947. (R. 47-56) A petition for rehearing was timely filed, (R. 58-74) and was denied August 14, 1947, (R. 75).

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended, Title 28, Sec. 347 (a) U.S.C.

QUESTIONS PRESENTED

I.

Whether the search and seizure, without a search warrant, were valid.

II.

Whether the conviction should be permitted to stand since, pending appeal in the Tenth Circuit Court of Appeals, Title 37 Oklahoma Statutes 1941, Sections 41 to 48 inclusive, were repealed by the Legislature of Oklahoma by the enactment of House Bill No. 254, effective on April 24, 1947.

III.

Whether the petitioners were properly convicted for aiding, assisting and abetting in the transportation and importation of intoxicating liquors into the State of Oklahoma in violation of Title 27, Section 223, U.S.C., in the absence of any allegation or proof as to the existence of a principal for whom petitioners acted in aiding and abetting in such transportation and importation.

SUMMARY STATEMENT OF MATTER INVOLVED

The facts necessary to be here considered are set forth in the opinion of the Circuit Court of Appeals, (R. 47-56).

For the convenience of this court, the case may be concisely stated as follows:

The petitioners were jointly charged by information consisting of two counts. The first count charged the petitioners with having transported intoxicating liquors into the State of Oklahoma in violation of Section 223, Title 27, U.S.C.A. The second count charged said petitioners, and each of them, with having assisted in the transportation of intoxicating liquors into the State of Oklahoma in violation of said section. (R. 5, 6, 7).

To the information as filed, each petitioner entered his separate plea of not guilty. (R. 7).

Motion to suppress evidence on the ground of unlawful search was timely filed (R.7, 8) and renewed at the time of the trial. (R. 17).

After having heard the evidence the trial court found each of the petitioners not guilty of transporting intoxivating liquor into the State of Oklahoma, as charged in the first count of the information, and found each of the petitioners guilty of assisting in the transportation of intoxicating liquor into the State of Oklahoma. (R. 8, 9, 10, 11 and 12).

The government offered the testimony of Roy B. Mogridge, Wallace E. Lamphear, Ralph Bratcher, William M. Pauley and Linwood J. Nay, each investigators for the Alcohol Tax Unit, Jack Caldwell, Police Officer in

Oklahoma City, and L. H. Cobb, Deputy Sheriff of Oklahoma County.

The petitioners offered no evidence but at the conclusion of the Government's evidence each renewed his separate motion to suppress the evidence, demurred to the evidence offered on behalf of the Government and moved the court to dismiss the prosecution. (R. 17-43 incl.).

The investigation, arrest, search and seizure were made by four officers of the Alcohol Tax Unit. Investigators Mogridge and Bratcher acted together, and Investigators Lamphear and Pauley acted together.

The testimony of Bratcher is identical with that of Mogridge except as hereinafter shown. Mogridge testified that he knew the defendant, Von Patzoll as a liquor dealer in Oklahoma City (R. 18) although he later admitted his knowledge in this respect was limited to the fact that Von Patzoll had a liquor dealer's stamp. (R. 25). This evidence was objected to on the ground that the stamp itself would be the best evidence. (R. 25). (In any event, possession of a liquor dealer's stamp would be no evidence of illegal activities as such a stamp would be necessary for sale of 3.2% wines in the State of Oklahoma.)

Mogridge and Bratcher saw Von Patzolls' car, a 1940 model black Buick coupe, in front of the LaMar Liquor Store, in Dallas, Texas, at about 7:00 o'clock on the evening of June 8, 1946. Two unidentified men were in the car; the petitioner, Von Patzoll was in the liquor store. The Von Patzoll car later turned across the street in front of a red light and followed behind said officers, who were also in a car, and passed the officers. About an hour or so later the same officers saw the same car again at the same

liquor store. The officers saw the same two men and Von Patzoll. Von Patzoll and one of the men were in the car and the other man was in the store. (R. 18-19). According to Bratcher the two men with Von Patzoll were later identified as Feezell and Brandon. (R. 32). At about 10:00 o'clock on the same evening the same car again passed the same officers on Cadiz Street, at the intersection of said street with LaMar. The car stopped and let Dee Garland Brandon, another of the petitioners, out of the car. He went across the street, into the Leeway Parking Lot and got into an International truck and trailer with the petitioner Evans, the truck being the one later seized near Moore, Oklahoma. (R. 19). The truck pulled out into LaMar Street and headed south. The end gate of the truck was down and the truck was empty. The truck went to the intersection of Corinth and LaMar Streets and turned into Corinth Street, went through an underpass and pulled up and stopped near a filling station which was closed. The officers passed on by and later came back and observed the truck still setting in the same spot with someone in it, whom the officers could not identify. (R. 19-20). The same officers later saw the same truck and a different Buick automobile, not the automobile owned by Von Patzoll and involved in Cause No. 3496, but a black sedanette owned by Feezel. The truck was headed north, followed by said Buick. (R. 20).

The officers followed the truck to Moore, Oklahoma. In route, the truck stopped at Davis, where the driver had some coffee. The truck arrived in Moore about 4:05 A.M. the following morning. About a half-hour after the truck arrived the Von Patzoll Buick came from the south, passed the truck and turned off across a road to the

east, out of sight of the officers. Following the Buick was a bob-tailed truck which pulled up in front of the other truck. The Von Patzoll Buick came back in on the highway, circled back and forth over close to the truck. The petitioner, Feezell, got out of the Buick and went over to the truck. Von Patzoll got out of the Buick and went over to the truck. The driver of the bob-tailed truck, Brandon, also went over to the truck. (R. 20-21). Von Patzoll went back to the Buick, Brandon went back to the bob-tailed truck and they all pulled out, both trucks and the Buick—the truck with trailer first, the bob-tailed truck behind it, and the Buick behind the bob-tailed truck. The officers followed the same to a point about one mile north of the Oklahoma County-Cleveland County line. After they got out of the town of Moore, the bob-tailed truck passed the truck with trailer and the officers did not see it again. The Buick stayed behind the truck with trailer and the truck and the Buick stopped when they arrived at the Oklahoma County-Cleveland County line. When the officers drove up, the truck started to turn off on a side road. The officers deciding they were uncovered, drove up to the Buick automobile. Mogridge got out of his car and got into the car of Von Patzoll and took him into custody. Then Bratcher, Mogridge and Pauley stopped the truck, and took Feezel and Evans into custody. (R. 21).

Any incriminating evidence found by the officers was obtained after such arrests. Unless the officers had sufficient information to make the arrest at the time the arrests were made, the search and seizure were unlawful.

The Von Patzoll car was not used for the purpose of hauling anything to the truck for loading therein. (R. 23).

All the officers knew in regard to Von Patzoll and his Buick was that they saw him at the liquor store and driving around in Dallas and that they saw Von Patzoll and his Buick in the town of Moore, Oklahoma. (R. 23). Von Patzoll arrived in Moore in his said Buick a half-hour after the truck with the trailer had arrived. (R. 23). Said officers really in fact knew nothing about Von Patzoll and had no evidence that he was engaged in an unlawful transaction at the time of his arrest. (R. 24).

Officers Lamphear and Pauley were acting together with the investigation, search and seizure. They saw the Von Patzoll Buick at the liquor store at about 7:30 P.M. on June 8. (R. 27). Said officers later saw the truck with trailer at the filling station. (R. 28). They saw a 1941 model Buick sedanette drive up to said truck. (R. 28). The sedanette was not the Von Patzoll Buick, which was later seized in Oklahoma. (R. 28). Said officers saw one man whom they could not identify load one package about the size of a whisky case into the truck with trailer, which was later seized in Oklahoma. (R. 28). They could not tell what the package was. (R. 31). The truck later came out on LaMar Street, traveling north, followed by the 1941 Buick sedan, (not the Von Patzoll car which was later seized and involved in Cause No. 3496.) (R. 28). Said officers followed the truck with trailer to Moore, Oklahoma, and their testimony in regard to what happened in Oklahoma is the same as Mogridge and Bratcher. They never did see anything loaded into the Von Patzoll Buick or anything taken out of it. (R. 31).

After Brandon got into the trailer truck, with Evans, in Dallas, he was not seen again until later when he drove the bob-tailed truck into Moore, Oklahoma. (R. 33).

REASONS FOR ALLOWANCE OF THE WRIT

FIRST. The search and seizure, involved, were violative of the Fourth Amendment to the Constitution of the United States and the decision of the Tenth Circuit Court of Appeals upholding said search and seizure is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Brown* v. *United States,* 4 F. (2) 246, and the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Emite* v. *United States,* 15 F. (2) 623. Said decision is also in conflict with the former decisions of the Tenth Circuit Court of Appeals in the following cases:

Edgmon, et al v. *United States,* 87 F. (2) 13;

United States v. *One 1937 Model Studebaker Sedan,* 96 F. (2) 104;

Jones v. *United States,* 131 F. (2) 539;

Bruner v. *United States,* 150 F. (2) 865

SECOND. The decision of the Tenth Circuit Court of Appeals in sustaining the conviction, involved herein, after repeal by the Legislature of the State of Oklahoma of Title 37, Sections 41 to 48, inclusive, O.S. 1941, which Oklahoma statute made effective said Title 27, Section 223, U.S.C., is in direct conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Small-Wood* v. *United States,* 68 F. (2) 244; the decision of the Ninth Circuit Court of Appeals in the case of *Green* v. *United States,* 67 F. (2) 846, and the decision of the Eighth Circuit Court of Appeals in the case of *Moore* v. *United States,* 85 F. 465.

THIRD. The decision of the Tenth Circuit Court of Appeals in sustaining the conviction, involved herein,

after repeal by the Legislature of the State of Oklahoma of Title 37, Sec. 41 to 48, inclusive, O.S. 1941, which Oklahoma statute made effective said Title 27, Sec. 223, U.S.C., is in direct conflict with the decision of the Supreme Court of the United States in the case of *United States* v. *Chambers*, et al., 291 U.S. 217.

FOURTH. The decision of the Circuit Court of Appeals for the Tenth Circuit in sustaining the conviction of the petitioners upon the second count of the indictment in which petitioners were charged with aiding, assisting and abetting the transportation and importation of intoxicating liquor into the State of Oklahoma in violation of Title 27, Section 223, U.S.C., in the absence of proof as to the existence of a principal for whom the petitioners acted in aiding, assisting and abetting such transportation and importation, is directly in conflict with the decisions of the other Circuit Courts of Appeals as follows:

(a) The decision of the First Circuit Court of Appeals in the cases of Keliher v. United States, 193 F. 8 and Dickinson v. United States, 159 F. 801.

(b) The decision of the Fifth Circuit Court of Appeals in the case of Falgout v. United States, 279 F. 513:

(c) The decision of the Sixth Circuit Court of Appeals in the case of Beauchamp v. United States, 154 F. (2) 413;

(d) The decisions of the Eighth Circuit Court of Appeals in the cases of Hoss v. United States, 232 F. 328; and Hale v. United States, 25 F. (2) 430;

(e) The decisions of the Tenth Circuit Court of Appeals in the cases of Suhay v. United States, 95 F. (2) 890 and Morgan v. United States, 159 F. (2) 85.

FIFTH. The opinion of the Tenth Circuit Court of Appeals, in sustaining the conviction of the petitioners of aiding, assisting and abetting in the transportation and importation of intoxicating liquors into the State of Oklahoma in violation of Title 27, Section 223, is contrary to and in direct conflict with the decision of the Supreme Court of the United States in the case of *United States* v. *Simmons,* 96 U.S. 360, and the opinion of said court in the case of *Coffin* v. *United States,* 162 U.S. 664.

BRIEF

FIRST

The search and seizure involved were violative of the Fourth Amendment to the Constitution and the decision of the Circuit Court upholding the same is contrary to the decisions of other Circuit Courts of Appeals and contrary to decisions of the Tenth Circuit of Appeals.

In the case of *Brown* v. *United States,* 4 Fed. (2) 246, (9 CCA), the facts are surprisingly like the facts in the instant case. They are set out in the opinion as follows:

> "The officer who made the arrest was the only witness at the trial. He testified that the plaintiff in error parked his car at the curb on one of the public streets of the city of Portland, removed a package from the back part of the car, and started up the street; that the package was not smooth, and from its appearance might contain bottles; that he then placed the plaintiff in error under arrest; that prior to that time he had been informed that the plaintiff in error was a bootlegger, and that the license number of the car driven by the plaintiff in error had been furnished him, but the source of his information was not disclosed in either case; that on another occasion the plaintiff in error had delivered a package at an office building in the city, and that the form of the package indicated that it might contain two bottles, but what the package contained he did not know, nor did he know what the package in this case contained. Beyond the foregoing, the officer had no knowledge of any kind, and no information from any source, that a crime was being committed in his presence. He testified repeatedly that he had no such knowledge, and that he acted on suspicion only. While an offi-

cer may arrest without warrant for reasonable cause, he can only act upon evidence; he cannot act upon mere suspicion."

In passing on the situation the court said:

"If, instead of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true. If we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property wrongfully seized was not admissible in evidence."

In the case of *Emite* v. *United States,* 15 Fed. (2) 623, (5 CCA), the facts involved and the ruling thereon are as follows:

" 'When we (the witness and the other officer) were traveling in an automobile, the accused passed us in another car, which was owned by one of the accused, who worked for the Dickinson ice plant at Dickinson, Texas. We noticed that they were traveling slowly, that their car appeared to be heavily loaded and weighed down on the springs, and they went over the rough spots in the highway very carefully. We followed them about 10 miles, then drove our car in front of theirs, told them to stop, and that we were federal officers, and we searched them and their car, and found the liquor in their car. We had no search warrant. The accused did not give us permission to search their car. I did not see or smell liquor until I opened the door of their car. The reason I suspected they had liquor

was because I had seen that car parked out by the side of the Dickinson ice plant, and I had been told that cars that were parked out by there hauled liquor from that ice plant. When I saw that car parked at the ice plant, it was about 30 feet from the highway and inside the ice plant property. I never raided or searched the Dickinson ice plant. I have made many arrests around Dickinson, Texas. It is a small town, and has the reputation of being a haven for still operators and bootleggers.'

"The testimony of the witness, not only did not show that, before the search was made, the officers had probable cause to believe that an offense had been committed, but indicated the absence of such probable cause. Probable cause did not exist, unless the facts and circumstances within their knowledge and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. Carrol v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790; Pales v. Paoli (C.C. A.) 5 Fed. (2) 280."

In the case of *Edgmon, et al.* v. *United States,* 87 Fed. (2) 13, (10 CCA), the facts involved are as follows:

"Ira Wofford, a constable of Sequoyah County, Oklahoma, and one Lewis observed the defendants drive in a Pontiac coupe to the loading dock of the Ft. Smith Wholesale Liquor Company, in Ft. Smith, Arkansas, load into the coupe four pasteboard cartons of the size and appearance of whisky cartons, and then drive down Second Street in Ft. Smith and cross the bridge into Oklahoma. Wofford and Lewis followed defendants for a distance of about two miles into Sequoyah County, Oklahoma, when Wofford stopped defendants and searched their automobile. He found therein four

cartons of whisky and arrested defendants, turned their automobile and the whisky over to one Wilson, a deputy United States Marshal."

In passing on the proposition there involved, the court said:

> "Here the state officers were not acting in behalf of the United States and no Federal officer participated in the search and seizure. *Furthermore, there was probable cause for the search.* Carrol v. U.S., 267, U.S. 132, 45 S.Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; Husty v. U.S., 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, 74 A.L.R. 1407. We conclude the motion to suppress was properly denied." (Emphasis supplied)

In the case of *United States* v. *One 1937 Model Studebaker Sedan*, 96 Fed. (2) 104, (10 CCA), the facts are set forth by the court as follows:

> "Soon after the federal investigator, named Harris, arrived in Lawton, Oklahoma, on December 1, 1936, he in person received reliable information verbally and by telephone that said intervener and his son Herman Morgan, and his son-in-law Lee Roy Walker, were engaged in carrying on an active illicit business in said city in both taxpaid and nontaxpaid intoxicating liquors. Further investigation by him disclosed that each of said parties had been convicted of violation of the liquor laws of the United States and that said Herman Morgan and said Walker were each holders of current Retail Liquor Dealer's Special Tax Stamps, and were illicitly handling such taxpaid as well as nontaxpaid liquor. Further investigation followed.
>
> "On January 13, 1937, said Harris observed Walker deliver to a known and notorious bootlegger a paper carton which resembled a whisky carton. Two days later said Harris again saw said Walker deliver a paper sack which he thought con-

tained two half-gallon jars of whisky and following this delivery he saw Walker drive to the residence of intervener. Said Harris received further evidence about that time to the effect that Walker was selling nontaxpaid liquor from his residence and thereafter undertook to watch said Walker's premises. While engaged in that task on February 4, 1937, the said officer, Harris, accompanied by his wife, observed a green Buick automobile back out from the said Walker's residence at about 3:15 in the afternoon and start northward, it being the same automobile that Walker had used in making the two prior deliveries.

"Said Harris followed said green Buick automobile, which was driven over the streets and along a driveway to a point near a garage of intervener's, located 35 feet from his residence, where the said green Buick car was then located in the driveway five feet from said garage, when said officer and his wife saw the intervener sitting under the steering wheel of a Studebaker car located in said driveway five feet from said garage, the said Walker then and there standing between the two cars about three feet apart in said driveway. The said officer having followed said Buick car and driving in on said driveway behind said car and the Studebaker car, announced his identity as being an Alcoholic Tax Unit United States Officer, and inquired of Walker whether he had any liquor in his car, who replied in the negative, at which time, the officer seeing intervener remove a paper sack from the seat in the Studebaker car beside him and place it on the floor of said car near his feet, then and there heard glass clink in said sack. Thereupon, the officer opened the door of the Studebaker car, took hold of the sack, and found that it contained two half-gallon jars of nontaxpaid whisky, whereupon he asked intervener where he obtained the whisky, who replied from a man that he did not know and that he got it for his son, Herman Morgan. Following this,

the said investigator's wife called the Sheriff. Another United States Alcoholic Tax Unit investigator, E. T. Smith, shortly thereafter arrived upon the scene."

* * *

"Said officer Smith testified that the said Herman Morgan and said Walker were known bootleggers with prior convictions therefor in the federal court."

* * *

"Said Harris with his wife in his car coasted along behind said green Buick car with the evident expectation of finding whisky therein. His identifying himself as such officer, and interrogating Walker as to whether he had liquor in said car so discloses. The movement of intervener at that time as to removal of the package from the seat of his car to its floor and the clinking of the glass attracted Harris' attention obviously diverted him from further attention then as to Walker and the green Buick car. With the facts and information before him he was justified in reaching the conclusion that Walker had probably delivered the paper package to intervener. Harris in thus coasting behind said green Buick car down said driveway, Walker would not have been permitted to complain as to a search of same as the evidence discloses that he had no interest in intervener's premises. Occinto v. U. S., 8th Cir., 54 F. 2d 351; Kelly v. U. S., 8th Cir., 61 F. 2d 843, 845, 86 A.L.R. 338, 346; Wida v. U. S., 8th Cir. 52 F. 2d 424; Nelson v. U. S., 8th Cir. 18 F. 2d 522; U. S. v. Messina, 2d Cir., 36 F. 2d 699; Whitcombe v. U. S., 3rd Cir., 90 F. 2d 290; Chepo v. U. S., 3rd Cir., 46 F. 2d 70; U. S. v. Crushiata, 2d Cir., 59 F. 2d 1007; In re Dooley, 2d Cir., 48 F. 2d 121."

In that case the Circuit Court of Appeals held that there was probable cause.

In the case of *Jones* v. *U. S.*, 131 Fed. (2d) 539, (10th CCA), the facts involved and the conclusion of the appellate court are set forth as follows:

> "The sale of intoxicating liquor was permitted in Texas but forbidden in Oklahoma, except in circumstances not pertinent here. Electra, Texas, is located near the line between the two states. The accused were associated together in the conduct of a liquor package store at Electra. There was a garage at the rear of the store. Inspectors for the Alcohol Tax Unit had the premises under surveillance from time to time for approximately three months prior to the time of the search and seizure in question. *On three or four separate occassions during that time they observed an automobile drive into the garage and later leave and start in the direction of Oklahoma; and these automobiles were apprehended after they crossed into Oklahoma and were found to contain contraband liquor.* With knowledge of these antecedent facts, on the day in question two inspectors observed a LaSalle automobile owned by one of the accused parked at the side entrance to the store and a Ford coach bearing Oklahoma license plates in the driveway leading to the garage. They watched the premises for about two hours, and then went out on the highway leading toward Oklahoma. It was then about 5:00 o'clock in the afternoon. After waiting a while they started back toward Electra. They met the LaSalle being driven by Leo Jones and the Ford being driven by Earl Jones. The LaSalle was in front. The inspectors turned around and followed. At a point two or three miles from the Red River bridge across the state line, the accused turned off the highway onto a dirt road which was a short-cut to the bridge. The officers speeded up, crossed the state line, went into the town of Davidson, Oklahoma, parked their car at a vantage point, and waited. In a few minutes

the LaSalle came over a hill and into the town, retraced its course, pulled over to the side of the road, and stopped near the crest of a hill. At about that time the Ford came up the hill and continued on to the town. When it passed the officers they pulled onto the highway and proceeded to give chase. The LaSalle followed the officers through the town and along the highway back to the bridge. The officers pursued the Ford through the town, back across the bridge and into Texas. The chase covered about thirty miles. Immediately after it started, Earl Jones accelerated the Ford to a high speed, at times sixty, at times seventy, and at times one hundred miles per hour. He left the highway at times, turned into secondary roads, and zigzagged across fields. Throughout the chase the officers had the siren on their automobile sounding. Finally the officers crashed into the Ford and stopped it. They found that it was equipped with a supercharger, that the heads had been blown off the cylinders, and that more than thirty gallons of assorted liquors were locked in a trunk at the rear. In view of the knowledge and information which the officers had previously acquired, in view of the significant and suspicious facts immediately preceding the chase, and in view of the significant and suspicious facts and circumstances connected with the chase itself, it is plain that at the time of the search and seizure the officers had information which would cause a reasonably discreet and prudent person to believe in good faith that the automobile was being used for the unlawful transportation of liquor into Oklahoma. Therefore, the search and seizure did not impinge upon the Fourth Amendment. Carrol v. U. S., supra; Husty v. U. S., supra. It follows that the court providently denied the motion and admitted the evidence." (Emphasis supplied)

In the case of *Bruner* v. *U. S.*, 150 F. (2d) 865, (10th CCA), the facts involved and the conclusion of the appellate court are set forth as follows:

> "On October 10, 1944, at about 1:00 A.M., George Long and Ernest Evans, Agents of the Alcohol Tax Unit, were by special assignment patrolling U. S. Highway 66 near the Texas-Oklahoma line on the alert for cars transporting whisky, into Oklahoma. Each was driving a radio-equipped automobile. The car occupied by Bruner and a companion, traveling at a speed of 75 miles per hour, passed the officers at a point in Texas near the state line and proceeded into Oklahoma. The officers sought to overtake the car with Evans in the lead. After proceeding five or six miles, Bruner checked his speed. Evans passed him and Long trailed behind. Bruner thereupon stopped his car and alighted therefrom to urinate. While thus engaged he was approached by Long, who had likewise stopped his car, and a conversation ensued.
>
> "In response to an inquiry, Bruner identified himself, saying, 'I'm Joe Bruner, from Thomas, Oklahoma.' Long then recognized Bruner as the party pointed out to him by Sheriff Scott a month before at Thomas, Oklahoma, as a person engaged in hauling liquor from Texas into Oklahoma. Long said, 'Joe, I am George Long, federal officer from Enid, Oklahoma.' Bruner exclaimed, 'Jesus Christ!' Long Inquired, 'How much of a load do you have?' Bruner responded, 'Twelve cases.' After this incriminatory admission, Long invited Bruner to open the back end of the car or turn over the keys, but Bruner assured him that the car was not locked.
>
> "At this juncture Evans returned. Either Evans, Long or Bruner opened the turtle-back of the car and approximately twelve cases of taxpaid whisky were found and seized. Bruner was taken into custody but the officers did not recall stating to him that he was under arrest.

"The officers did not have a warrant for search of the automobile. They had no information that Bruner was transporting whisky in this automobile. They had no knowledge that Bruner was hauling whisky from Texas into Oklahoma on this particular night. They were not looking for Bruner, or the automobile which he was driving, and did not recognize the automobile or driver until Bruner disclosed his identity."

• • •

"If the arrest had preceded the crucial admission, an interesting question would be presented as to whether facts elicited by interrogation of a party unlawfully held in custody may afford the basis for a lawful search and seizure. But we do not reach that question. Here the evidence clearly shows that Bruner was not under arrest when he revealed the presence of the liquor in the automobile. He had not been taken into custody, nor had he been detained against his will. He had not been threatened or coerced by the officer. See 4 Am. Jur. 5, Sec. 2; State v. Distict Court, 70 Mont. 378, 225 P. 1000; Peloquin v. Hibner, 231 Wis. 77, 285 N.W. 380. Prior to the fatal admission, no act or statement of Officer Long could reasonably have been interpreted by Bruner as disclosing an intention to restrain him of his liberty." (Emphasis supplied)

The facts in the instant case fall far short of the facts involved in the cases above cited.

In the Edgmon case, supra, the officers saw the defendants drive into the loading dock of a wholesale liquor company and saw the defendants load pasteboard cartons of the size and appearance of whisky cartons into the car. The officers followed the car across the state line, then properly arrested the defendants for a violation committed in their presence and made the search in question.

In the case of *United States* v. *One 1937 Model Studebaker Sedan,* supra, the officers knew that the defendants were holders of retail liquor dealer's stamps and that they were illicitly handling taxpaid and nontaxpaid liquor. On several occasions prior to the occasion involved in that case the officers had seen the defendants make deliveries of nontaxpaid whisky. On the occasion involved the officers saw the defendants remove a paper sack from the seat of the automobile in question and place it on the floor of the car near his feet and heard the glass clink in the sack. Thereupon the officers arrested the defendants and made the search in question.

In the Jones case, supra, the accused were associated together in the conduct of a liquor store. There was a garage at the rear of the store. On three or four separate occasions the officers observed the automobiles drive into the garage and drive off in the direction of Oklahoma. Such automobiles were followed across the line into Oklahoma, apprehended and found to contain contraband liquor. With such knowledge, the officers saw a LaSalle automobile parked at the side entrance of the store and a Ford Coach, bearing Oklahoma license, run in the driveway leading into the garage in question They later saw the LaSalle and Ford drive in the direction of Oklahoma. The ensuing chase, arrest and seizure are fully described in the opinion and will not be repeated. Suffice to say, the facts in the instant case fall far short of those in the Jones case.

In the Bruner case the search is justified principally by the incriminating admissions made by the defendant *before he was arrested.* In the instant case any and all

incriminating statements were made and the evidence obtained subsequent to the arrest of the appelants.

In his remarks from the bench at the conclusion of the trial, the trial court justified the search by that which was found in the course of the search. We quote:

> "The private car was down at the liquor store, and after loading up the truck, there isn't any question about the truck being loaded, and this list or invoice which—and with all this other information, this bill which was taken from the person of Von Patzoll, and which was dated on June 8th, and then this invoice of the liquor made by the agent. This is an enormous amount of liquor, and then later the statements from the wholesale men, the liquor dealers, all of this evidence was procured after the seizure, but merely justified the opinion that these officers had at the time of the seizure. The Court is of the opinion that the Constitutional rights of the defendant were not violated by the seizure, and therefore, finds the defendants guilty."

The evidence obtained by the search does not justify the search. See *Byars* v. *United States,* 273 U. S. 28; *People* v. *Martin,* 46 N.E. (2d) 997; *Neuslin* v. *District of Columbia,* 115 Fed. (2d) 690. In the last cited case of Circuit Court of Appeals for the District of Columbia said:

> "It has been held that a confession does not make good a search illegal at its inception. This is a part of a broader rule that an illegal search cannot be legalized by what it brings to light."

What was found does not justify the search. Neither does any statement made by either of the appellants after their arrest justify their arrest or the search and seizure since the same were illegal in their inception.

SECOND

The decision of the Tenth Circuit Court of Appeals in sustaining the convictions, involved herein, after repeal by the Legislature of the State of Oklahoma of Title 37, Oklahoma Statutes 1941, Sections 41 to 48, inclusive, is in conflict with decisions of other Circuit Courts of Appeals and of the Supreme Court of the United States.

Subsequent to the repeal of the Eighteenth Amendment the Congress enacted the Liquor Enforcement Act of 1936, which forms the basis of the prosecutions involved herein. This act is effective and operative with respect to Oklahoma when and only when the laws of Oklahoma either (1) prohibit all importation or transportation of intoxicating liquiors into said state, or (2) require a permit to accompany liquor lawfully imported. *Dunn* v. *United States,* (10 C.C.A.) 98 F. (2d) 119, 117 A.L.R. 1302. See also *Robason* v. *United States,* 122 F. (2d) 991.

Subsequent to the foregoing decision the legislature of the State of Oklahoma enacted House Bill 264 of the Session Laws of 1939, which statute is now carried as Sections 41 to 48, inclusive of Title 37, Okla. Stat. 1941. Said statute, under the *Dunn* decision made effective the Liquor Enforcement Act of 1936.

During its session in the year 1947, the Oklahoma Legislature enacted Engrossed H. B. 254, which carried the emergency clause and therefore, became effective on the date of its approval. Same was signed by the Speaker of the House of Representatives on April 21, 1947, by the President Pro Tem of the Senate on April 15, 1947, and was approved by the Governor of the State of Oklahoma on the 24th day of April, 1947. Said statute provides in part as follows:

"Section 21. This Act shall become operative and effective for the purpose of administration and enforcement at midnight, June 30, 1947; provided, that all tax accruals, applicable rules and regulations, penalties and obligations accruing under existing law shall remain unimpaired by any provisions of this Act, that all delinquent tax penalties, license fees and other obligations may be enforced under the procedure as now provided by law and/or as provided herein; and, provided, further, that all bonds, permits and licenses shall remain intact and unimpaired until same shall have been renewed or cancelled under the provisions of this Act.

"Section 22. Chapter 2, of Title 37, Oklahoma Statutes 1941, and Chapter 2 of Title 37, Session Laws 1945, and all laws in conflict herewith are hereby repealed subject to the conditions of enforcement of accrued rights as provided in Section 21 of this Act. 37 O.S. 1941 §§ 41, 42, 43, 44, 45, 46, 47 and 48 are hereby repealed."

Thus it is seen that the last cited statute repeals the 1939 Act which made effective the Liquor Enforcement Act of 1936.

H. B. 264 of the 1939 Session Laws, Sections 41 to 48, inclusive, of Title 37, Okla. Stat. 1941, has been of no force and effect since April 24, 1947. For that reason the Liquor Enforcement Act of 1936, involved herein, has, since April 24, 1947, been of no force and effect in so far as the state of Oklahoma is concerned, by reason of the repeal of the Oklahoma statute which had theretofore made the same effective.

We should here note particularly Report No. 1258, 74th Congress, prepared by Mr. Celler of the Committee of the House of Representatives on the Judiciary which accompanied the Liquor Enforcement Act of 1936. Mr.

Celler summed up for the Committee the desire of the government, as follows:

> "The liquor traffic will be controlled by the Federal Government only to the extent that the State may desire; and that is in keeping with the obvious intent of the Twenty-first Amendment."

Therein lies the gist of the Liquor Enforcement Act of 1936. Stated differently it lodged within the states the sole power to make the Federal Statutes applicable and operative and non-applicable and non-pperative as respects the particular state.

> "The Statute is applicable only where the State has adopted a control method coming within that outlined by the Federal Statute." *Arnold* v. *United States,* (C.C.A. 8) 115 F. (2d) 523.

It was for the purpose of qualifying Oklahoma for Federal assistance that the legislature of Oklahoma in 1939 passed H. B. 264, Sections 41 to 48, inclusive, Title 37, Okla. Stat. 1941. Having properly qualified under the Federal Act, there was no question but that Oklahoma qualified for Federal Assistance and that the Federal Act thereby became applicable with reference to Oklahoma. Thus, the Federal offense of transporting under the statute became activated and enforceable. *Tucker* v. *United States* (10 C.C.A.) 123 F. (2d) 280, 1941 cf., *Hinkle* v. *United States,* (8 C.C.A.) 155 Fed. (2d) 217. Stated differently, when Oklahoma passed the "Permit Law" it, the state of Oklahoma, by virtue of its determination made the Federal law applicable to the state of Oklahoma. See *Hayes* v. *United States,* (10 C.C.A.) 112 F. (2d) 417; *Harris* v. *State,* 74 Okla. Cr. 13, 122 Pac. (2d) 401; *Arnold* v. *United States,* (8 C.C.A.) 115 F. (2d) 523; *Gregg* v. *United States,*

116 F. (2d) 609 (8 C.C.A.); *Robason* v. *United States,* (10 C.C.A.) 122 F. (2d) 991; *Dolloff* v. *United States,* (8 C.C.A.) 121 F. (2d) 157.

Effective as of April 24, 1947, the Oklahoma Legislature, exercising the right and power reserved to it by virtue of the Twenty-first Amendment, enacted House Bill 254, supra, which repealed Sections 41 to 48, inclusive, of Title 37, Okla .Stat. 1941. By that action the Legislature of the state of Oklahoma effectively withdrew the condition necessary to the continued applicability of the Liquor Enforcement Act of 1936 and the same therefore became inoperative and of no further force and effect in so far as the state of Oklahoma is concerned.

The Liquor Enforcement Act of 1936 is therefore no longer effective in so far as the state of Oklahoma is concerned. No prosecution may now be instituted under said act for an alleged offense committed subsequent to April 24, 1947. Under the authorities the same rule applies not only to prosecutions or offenses committed subsequent to said date, but is applicable to prosecutions, including proceedings on appeal, continued or begun after said date. Title 1, U.S.C.A. section 29, has no application in this situation. *United States* v. *Chambers,* 54 S. Ct. 434, 291 U.S. 217, 78 L. ed. 763; affirming, D.C., *U.S.* v. *Gibson,* 5 F. Supp. 153; *Green* v. *United States,* 67 F. (2d) 846 (9 C. C.A.); *Moore* v. *United States,* (8 C.C.A.) 85 F. 465; *Smallwood* v. *United States,* 68 F. (2d) 244 (5 C.C.A.)

In the case of *United States* v. *Chambers, supra,* the appellee had been indicted in the District Court for the Middle District of North Carolina, for conspiring to violate the National Prohibition Act. The indictment was

filed on June 5, 1933. Chambers pleaded guilty but prayer for judgment was continued until the December term. On December 6, 1933, the case was called for trial as to Gibson. Chambers then filed a plea in abatement and Gibson filed a demurrer to the indictment, each upon the ground that the repeal of the Eighteenth Amendment of the Federal Constitutition deprived the court of jurisdiction to entertain further proceedings under the indictment. The District Judge sustained the contention and dismissed the indictment. The Government appealed. In passing on the proposition there involved the court said:

> *"Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it. The law, here sought to be applied, was deprived of force by the people themselves as the inescapable effect of their repeal of the Eighteenth Amendment.* The principle involved is thus not archaic but rather is continuing and vital - - *that the people* are *free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it.*
>
> "What we have said is applicable to prosecutions, including proceedings on appeal, continued or begun after the ratification of the Twenty-first Amendment. We are not dealing with a case where final judgment was rendered prior to that ratification. Such a case would present a distinct question which is not before us." (Emphasis supplied).

It can with as much logic be said that the Liquor Enforcement Act of 1936 was not repealed but was rendered inoperative in so far as Oklahoma is concerned, by the Legislature of Oklahoma. The law, here sought to be applied, was deprived of the force, in so far as Oklahoma is concerned, by Oklahoma itself, as the inescapable effect

of its repeal of the Oklahoma permit law. The state of Oklahoma was free to withdraw the authority it had conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it. This is applicable to prosecutions, including proceedings on appeal, continued or begun after the repeal of the Oklahoma permit law.

In its opinion herein the Tenth Circuit Court of Appeals said:

> "Here, the defendants were charged and convicted under a Federal law which is still in force and effect."

The Federal law, however, is no longer in force and effect in so far as the State of Oklahoma is concerned, and has not been in force and effect in so far as the state of Oklahoma is concerned since April 24, 1947.

The Circuit Court also said:

> "It is true that the existence of the requisite prohibitory laws of Oklahoma is a factual ingredient of the Federal offense with respect to importations into Oklahoma, but that factual ingredient existed when the offense was committed."

We think the Oklahoma "Permit Law" was not a factual ingredient but was that which breathed the breath of life into the Liquor Enforcement Act of 1936 and made the same effective in so far as the state of Oklahoma was concerned. When that vitalizing force was withdrawn the Liquor Enforcement Act of 1936 ceased to exist and was of no further force and effect with reference to the state of Oklahoma. True, the Liquor Enforcement Act of 1936 has not been repealed and is still in force and effect with reference to states which come within its purview. Okla-

homa is not one of those states. The Liquor Enforcement Act of 1936 was just as effectively vitiated by the repeal of the Oklahoma "Permit Law" in so far as Oklahoma is concerned, as was the National Prohibition Act by the repeal of the Eighteenth Amendment. The Liquor Enforcement Act of 1936, here sought to be applied, was deprived of force, in so far as Oklahoma is concerned, by the Legislature of Oklahoma, as the inescapable effect of the repeal of the Oklahoma "Permit Law." The State of Oklahoma was free to withdraw the authority it had conferred and, when withdrawn, neither the Congress nor the Courts can assume to continue to exercise it. This is applicable to prosecutions, including proceedings on appeal, continued or begun after the repeal of the Oklahoma "Permit Law."

THIRD

The decision herein, in upholding the conviction of the defendants as accessories in the absence of proof of the existence of a principal, is contrary to the decisions of other Circuit Courts of Appeals, the decisions of the Tenth Circuit Court of Appeals and the decisions of the Supreme Court of the United States.

In this case the petitioners were jointly charged by indictment consisting of two counts. The first count charged the petitioners with transportation and importation of intoxicating liquor into the State of Oklahoma in violation of Section 23, Title 227, U.S.C. The second count charged petitioners, and each of them, with aiding, assisting and abetting such transportation and importation of intoxicating liquors into the State of Oklahoma. The trial court found each of petitioners not guilty under the

first count of the indictment and found each of the petitioners guilty under the second count of the indictment.

In finding the petitioners not guilty of the charged contained in the first count of the indictment the trial court found that neither of petitioners was the principal in the crimes charged and in finding the defendants guilty under the second count the trial court found the petitioners guilty as accessories or of aiding, assisting or abetting in the transportation and importation of intoxicating liquors into the State of Oklahoma. Petitioners contended in the Circuit Court of Appeals and now contend that the evidence was insufficient to sustain the judgment and sentence on the second count of the indictment and that the judgment is contrary to law with reference to said court in that there was no allegation or proof as to the identity or existence of a principal for whom the petitioners acted in aiding and abetting the transportation and importation of intoxicating liquors into the State of Oklahoma.

The decision of the Tenth Circuit Court of Appeals in this respect is in direct conflict with decisions from various Circuit Courts of Appeals and decisions of the Supreme Court of the United States.

In the case of *Keliher* v. *United States, supra,* Keliher not connected with the bank involved, was prosecuted as an aider and abettor of one Coleman, a bookkeeper thereof. In that case the Circuit Court of Appeals said:

> "Coleman has been convicted and sentenced; but, of course, in the present case, it was necessary to allege and prove sufficient facts to support anew that conviction."

In the case of *Dickinson* v. *United States, supra,* it was held that the knowledge of the unlawfulness of the misap-

plication charged brought home to Dickinson the aider and abetter, could not aid the United States in the prosecution, unless the knowledge of Foster, the cashier, the principal named in the indictment, was proven, and the jury was so charged. This holding is applicable herein, in that it required that the guilt of the principal, the cashier, be established as a necessary part of the guilt of the aider and abettor.

In the case of *Falgout, et al.* v. *United States, supra,* it was held that a defendant, admittedly not present at the commission of a crime, could be convicted as an accomplice only on conviction of those directly charged with its commission, and was prejudiced by an error which rendered their conviction illegal.

In the case of *Beauchamp* v. *United States, supra,* there was involved a prosecution for aiding a deserter. The court said:

> "We find nothing in the statute or in the cases which prevent the District Court from proceeding in this case in the same manner as it proceeds in the trial of any other case involving an offense made such by federal statute. *It is true that the Government has the burden of proving, among other facts, the necessary fact that the soldier involved was a deserter from the military service of the United States.* But that issue of fact, as well as all other disputed facts, can be presented to the jury and decided by its verdict." (Emphasis supplied).

In the case of *Hoss* v. *United States, supra,* the trial court instructed the jury that the two aiders and abettors could not be convicted unless the jury found that Rochau, the cashier, drew cashier's check with intent thereby to defraud the bank, and also found that the two defendants

aided and abetted him with like intent. The instructions were upheld by the Circuit Court of Appeals.

In the case of *Hale* v. *United States, supra,* John Ramsey was charged with the crime of murder and William K. Hale was charged with having aided, assisted and abetted the said John Ramsey in said crime. In that case the Eighth Circuit Court of Appeals, speaking through Judge Van Valkenburgh, said:

> "In any case, as to Hale, it would be necessary to make proof that Ramsey committed the murder. United States v. Mills, 7 Pet. 138, 141, 8 L. Ed. 636; United States v. Simmons, 96 U.S. 360, 362, 24 L. Ed. 819."

In the case of *Suhay* v. *United States, supra,* appellants Robert J. Suhay and Glen J. Applegate were charged by indictment with the murder of Wimberly Wayne Baker in the post office building at Topeka, Kansas. In that case the appellants were both charged, as principals, with the crime of murder and found guilty of such charge. Neither appellant was charged as an aider and abettor, as in the instant case. In that case the Tenth Circuit Court of Appeals, speaking through Judge Bratton, said:

> "It was essential to the conviction of both of them that the government show that both participated in the homicide or that one committed it and the other acted in concert with him. Both were guilty as principals if one fired the shot or shots pursuant to a common purpose or design and the other aided or abetted him. 18 U.S.C.A. §550; Gooch v. United States, 10 Cir., 82 Fed. (2d) 534; Territory v. McGinnis, 10 N.M. 269, 61 P. 208."

In the case of *Morgan* v. *United States, supra,* decided by the Tenth Circuit Court of Appeals the court, speaking through Judge Huxman, said:

"One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense. Obviously, therefore, one cannot be found guilty under a charge of aiding and abetting in the commission of an offense unless there is satisfactory evidence not only of his participation but also that another for whom he was acting was connected with the offense. It has been held that where one is charged with aiding and abetting it is necessary that the indictment name the person or state that his name is unknown. All that Count 2 charged was that appellant did assist in transporting liquor from Texas to Oklahoma. No attempt was made therein to state for whom he was acting or that the name of such person was unknown. While the failure to challenge the legal sufficiency of the second count may have waived this defect in the indictment, it did not relieve the government from the necessity of proving for whom appellant was hauling this liquor or at least that he was hauling it for some one else. No attempt was made to directly show for whom he was transporting this liquor.

"(5) The record and brief of the government are silent as to who the government contends was the principal whom Morgan was aiding and assisting in the transportation of the liquor."

It has been repeatedly held that a person cannot be held criminally liable as an aider and abettor unless the act committed by the person aided constitutes a crime. *Manning* v. *Biddle,* 14 Fed. (2d) 518, (8 C.C.A.); *Yenkichi Ito* v. *United States,* 64 Fed. (2d) 73, (9 C.C.A.)

In the case of *United States* v. *Simmons,* 96 U.S. 360, the Supreme Court of the United States said:

"Since the defendant was not charged with using the still, boiler, and other vessels himself, but only with

causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

In the case of *Coffin* v. *United States*, 162 U.S. 664, the Supreme Court said:

"It is evident that no matter how active the cooperation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons cooperating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offense *there must, of course, be a principal, and it follows that without the concurring act of an officer ar agent of a bank, third persons cannot commit a violation of the provisions of section 5209*. If, therefore, a violation of the statute in question is committed by an officer and an outsider the one must be prosecuted as the principal and the other as the aider and abettor." (Emphasis supplied)

Conclusion

For the reason hereinabove set forth, it is respectfully submitted that a writ of certiorari be granted.

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APPENDIX

APPENDIX "A"

Liquor Enforcement Act of 1936, Title 27, Sections 221 to 228, Inclusive

221. Citation of chapter

This chapter and sections 388-390 of Title 18 may be cited as the "Liquor Enforcement Act of 1936." (June 25, 1936, c. 815, § 1, 49 Stat. 1928).

222. Definitions

(a) Wherever used in this chapter and sections 388-390 of Title 18, the word "State" shall mean and include every State, Territory, and possession of the United States, unless otherwise specifically provided.

(b) As used in this chapter and sections 388-390 of Title 18, the word "vessel" includes every description of water craft used, or capable of being used, as a means of transportation in water craft used, or capable of being used, as a means of transportation in water or in water and air; and the word "vehicle" includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air. (June 25, 1936, c. 815, § 2, 49 Stat. 1928).

223. Transporting into state where sale prohibited; penalty; state definition of intoxicating liquor adopted.

(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical

purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter and sections 388-390 of Title 18, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State. (June 25, 1936, c. 815, § 3, 49 Stat. 1928)

224. Seizure and forfeiture

All intoxicating liquor involved in any violation of this chapter and sections 388-390 of Title 18, the containers of such intoxicating liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfieted. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter

in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws. (June 25, 1936, c. 815, § 4, 49 Stat. 1928.)

225. Enforcement; conferring powers and duties; regulations

The Secretary of the Treasury shall enforce the provisions of this chapter and of sections 388 to 390 of Title 18.

Regulations to carry out the provisions of this chapter and sections 388-390 of Title 18 shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. (June 25, 1936, c. 815, § 5, 49 Stat. 1929).

226. Effect on other laws; Canal Zone

Nothing contained in this chapter or sections 388-390 of Title 18 shall repeal any other provisions of existing laws except such provisions of such laws as are directly in conflict with said chapter and sections and nothing in said chapter and sections shall apply to the Canal Zone. (June 25, 1936, c. 815, § 10, 49 Stat. 1930.)

227. Separability provision

If any provision of this chapter and sections 388-390 of Title 18, or the application thereof to any person or circumstances, be held invalid, the remainder of this chapter and sections 388-390 of Title 18, and the application of such provision to other persons or circumstances, shall be not affected thereby. (June 25, 1936, c. 815, § 11, 49 Stat. 1930).

228. Effective date

This chapter and sections 388-390 of Title 18 shall be effective as of the thirtieth day following June 25, 1936. (June 25, 1936, c. 815, § 12, 49 Stat. 1930.)

APPENDIX "B"

The Oklahoma "Permit Law", Title 37, Sections 41 to 48, inclusive, Oklahoma Stat. 1941.

41. Importation without permit unlawful

It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four (4%) percent of alcohol by volume, without a permit first secured therefor as hereinafter provided. Laws 1939, p. 16, § 1.

42. Permit for importation and transportation—Bond

Permits may be issued, as in this Act provided, for such importation and transportation of alcohol for scientific or mechanical purposes by and to such scientific institutions, universities and colleges as are authorized to secure the same free of tax under the laws of the United States, and alcohol by and to hospitals and sanitariums for medicinal use in such hospitals and sanitariums, and for the importation and transportation of alcohol to and by any apothecary, druggist, pharmicist, or manufacturing agency, who shall need same for such purpose and, who shall have executed a bond to the State of Oklahoma, approved by

the Tax Commission of the State of Oklahoma, in the sum of not less than One Thousand ($1,000.00) Dollars, conditioned that none of said alcohol shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, or in such manufacturing business, the sale of which prescriptions, medicines, or manufactured products would not subject him or it to the payment of the special tax required of the liquor dealers by the United States. Permits may also be issued for the importation and transportation, or causing to be imported or transported into this State, of wine for sacramental purposes. No permit shall be issued to any person, or for any purpose, or for the importation of any intoxicating liquor, except as specifically authorized under this Section. Laws 1939, p. 16, §2.

43. Obtaining permit from Tax Commission—Permit to accompany shipment—Return to Commission—Cancellation—Evidence

Any person, individual, firm, corporation, or association desiring to import, bring in, or transport intoxicating liquor, containing more than four (4%) per cent of alcohol by volume, shall first secure from the Tax Commission of the State of Oklahoma, a permit as herein provided. Such permit shall accompany such intoxicating liquor at all times while being imported, brought into and transported into and in the State of Oklahoma, shall be in possession of the person or carrier transporting the same and shall, upon demand, be exhibited to any peace officer or other duly constituted agent or representative of the State of Oklahoma, or such officer of the United States of America. When said intoxicating liquor shall have reached

its destination, such permit shall be returned to the said Tax Commission and by it marked "cancelled." In any complaint, information, indictment or other proceeding laid or brought under this Act, it shall not be necessary to negative the issuance or possession of a permit, and the burden of establishing such issuance and possession shall be upon the person or party claiming the benefit thereof. Failure to produce and exhibit such a permit upon demand as provided in this Act, shall constitute prima facie evidence of the lack of such permit. Laws 1939, p. 17, §3.

44. Application for permit—Form and contents—Verification

The application for such permit shall be in writing, duly verified, upon a form approved by said Tax Commission, and shall include the date, name of the applicant, name and location of the person, firm or corporation from whom said intoxicating liquor is to be bought or procured, the kind, character, quality and quantity thereof, the purpose for which it is to be used, the date and amount of last importation, and amount remaining on hand; that applicant has never been convicted of violating the prohibitory liquor laws of the State of Oklahoma or of any law of the United States, and that he has not sold or used, in violation of the laws of Oklahoma, any intoxicating liquor theretofore secured under the provisions of this Act. Said application must be verified by the applicant or by the president, vice-president, secretary, or manager of the corporation, association, or organization making such application. Applications for permits for importation of wine for sacramental purposes shall be verified by a minister, priest, pastor, or duly authorized official of the

church or organization for which such application is made. Laws 1939, p. 17, § 4.

45. Permit—Form and contents—Effective period—Application—Execution—Record

The permit provided for by the terms of this Act shall be upon a form prepared by the Attorney General of the State and approved by the Tax Commission and shall be executed by the Tax Commission and attested by the Secretary of State under the seal of the State. It shall include the date, name of the applicant, name and location of the person, firm or corporation from whom such liquor is to be bought or procured, the kind, character, quality and quantity thereof, and the purpose for which it is to be used. The application and permit shall contain such additional provisions as may be prescribed by the said Tax Commission or by rules and regulations, not inconsistent herewith, as prepared by the Attorney General and then adopted by the Governor. Any such permit shall be valid and in effect for a period of fifteen (15) days from and after the date thereof. No permit shall be issued except upon the filing of a proper and sufficient application as provided by this Act, nor unless the said Tax Commission shall find that said application is in good faith and that such liquor is to be brought into the State for a lawful purpose, as herein defined. The execution of a permit by the Tax Commission shall be by a member of the Commission or by its chief clerk and the attestation of the Secretary of State shall be made a matter of permanent record in the office of the Secretary of State. Laws 1939, p. 18, § 5.

46. Penalty for violation of Act

Any person violating any of the provisions of this Act shall be punished by a fine of not less than Fifty ($50.00) Dollars nor more than Two Thousand ($2,000.00) Dollars and by imprisonment of not less than thirty (30) days in the county jail nor more than five (5) years in the State Penitentiary. Laws 1939, p. 18, §6.

47. Fees—Payment into state treasury

The said Tax Commission and the Secretary of State shall each charge and collect a fee of Two ($2.00) Dollars for each of said permits so issued, which fund shall be paid into the State Treasury. Laws 1939, p. 18, §7.

48. Inapplicability to search warrants

Nothing in this Act shall be construed to change or affect the law of this State applicable to search warrants. Laws 1939, p. 19, § 10.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 333

ERIC VON PATZOLL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 334

DEE GARLAND BRANDON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 335

GENE LUTHER FEEZELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 336

JAMES H. EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 47–56) are not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered July 9, 1947 (R. 56–58), and a petition for rehearing (R. 59–74) was denied August 14, 1947 (R. 75). The petition for writs of certiorari was filed September 9, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the search and seizure were based on probable cause.

2. Pending petitioners' appeals from convictions of assisting in the transportation of intoxicating liquor into Oklahoma without the required Oklahoma permit, in violation of the Federal Liquor Enforcement Act of 1936, Oklahoma repealed her laws prohibiting the importation of liquor without a permit, which laws had made the Federal Act applicable to transportations into Oklahoma. The second question presented is whether Oklahoma's repeal of her prohibitory laws necessitated a setting aside of the convictions.

3. Whether the evidence was sufficient to sustain petitioners' convictions of "assisting" in the transportation of the liquor.

STATUTES INVOLVED

Section 3 (a) of the Federal Liquor Enforcement Act of 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 223 (a)), provides:

> SEC. 3. (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 1 of Title 37 of the Oklahoma Statutes (1941 ed.) provides in pertinent part:

> It shall be unlawful for any person * * * to * * * sell * * * any

> liquors * * * which contain more than three and two-tenths (3.2%) per cent of alcohol, measured by weight, and which is capable of being used as a beverage * * *. A violation of any provisions of this section shall be a misdemeanor, and shall be punished by a fine * * * and by imprisonment * * *.

Sections 41 and 46 of Title 37 of the Oklahoma Statutes (1941 ed.) provided in pertinent part on June 9, 1946, the date of the offense involved herein:

> § 41. *Importation without permit unlawful.*—It shall be unlawful for any person * * * to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor * * * containing more than four (4%) percent of alcohol by volume, without a permit first received therefor as hereinafter provided
>
> * * * * *
>
> § 46. *Penalty for violation of Act.*—Any person violating any of the provisions of this Act shall be punished by a fine * * * and by imprisonment * * *.

Section 22 of the Oklahoma Act of April 24, 1947, effective on that date, provides in pertinent part:[1]

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[1] See R. 55, 66; see also Oklahoma Statutes Annotated (July 1947 Supplement), Title 37, § 163.1, note.

* * * 37 O. S., 1941, §§ 41, 42, 43, 44, 45, 46, 47, and 48 are hereby repealed.

STATEMENT

Count 1 of a two-count information (R. 5–7) filed June 10, 1946, in the District Court for the Western District of Oklahoma charged that petitioners, on June 9, 1946, transported from Texas into Oklahoma approximately twenty-nine cases of intoxicating liquor unaccompanied by the permit required under the laws of Oklahoma, in which State all sales of intoxicating liquor containing more than 4 per centum of alcohol by volume, except for scientific, sacramental, medicinal, or mechanical purposes, are prohibited, in violation of Section 3 (a) of the Federal Liquor Enforcement Act of 1936 (*supra,* p. 3). Count 2 charged that petitioners "did * * * assist in the transportation of" the same liquor, in violation of the same section. Following a trial by a judge, a jury having been waived (R. 16), petitioners were found not guilty on count 1 and guilty on count 2 (R. 44), and each was sentenced to imprisonment for 12 months and to pay a fine of $1,000 (R. 8–12). On appeal, the judgments of conviction were affirmed (R. 56–58), one judge dissenting on the ground that the proof did not support the convictions on the second count (R. 56).

The evidence adduced by the Government may be summarized as follows:

Twice within an hour on the evening of June 8, 1946, two agents of the Alcohol Tax Unit observed petitioners Von Patzoll, Brandon, and Feezell in Von Patzoll's Buick coupe outside a liquor store in Dallas, Texas. On the first occasion, Von Patzoll, and on the other occasion one of his companions, entered the store. Von Patzoll had been known to the agents for several years as a liquor dealer in Oklahoma City. (R. 18–19, 26, 32.) Several hours later the Buick coupe returned to the vicinity, and Brandon was seen to leave the car and join another man in an International truck that was parked in a parking lot. This other man had been previously observed around the truck, and was later identified as petitioner Evans. (R. 19, 33, 35.) Driven by Evans, the truck was then observed to proceed to a point close to a nearby filling station, not then open, where it parked with its lights extinguished (R. 19). Two other agents, who had in the meantime been summoned to the scene by radio, observed packages resembling cases of whiskey being loaded into the truck at this location from a Buick sedan owned by Feezell, which had shortly before pulled up beside the truck (R. 20, 28, 35). Presently, the truck, followed by the Buick sedan, was observed to proceed north, and all four agents followed in two cars (R. 20, 28–29). The Buick sedan turned off in another direction after a short while, and the agents continued to follow the truck. The

agents "never let it out of our sight until it got to Moore, Oklahoma." Agent Mogridge testified that the truck first stopped at Davis, Oklahoma, where "it [*sic*] * * * got some coffee." (R. 20.) Agent Pauly testified that at Davis he and agent Lamphear "were immediately behind Mr. Evans' truck and he pulled up to the filling station on one side of the street, and we pulled up at another. That is the first time I had seen Mr. Evans, and he was by himself in the truck at that time" (R. 35). Evans then drove the truck to Moore, Oklahoma, where he parked at approximately 4 a. m. A half hour later, Von Patzoll, Brandon, and Feezell arrived on the scene in two vehicles, one of which was the Buick coupe in which they had been seen the previous evening. (R. 20–21, 23.) The four petitioners had a short conference, following which the truck, occupied by Evans and Feezell, and the Buick coupe, driven by Von Patzoll, proceeded again along the highway, while Brandon, in the third vehicle, after accompanying the other vehicles a short distance, turned off the road and drove to his home in the vicinity (R. 21–22, 30).

Within a short while the agents stopped the Buick coupe and, a half mile beyond, the truck. After the agents identified themselves, Evans was asked whether he had a manifest or bill of lading for what he had on the truck. When he replied in the negative, he was asked what he had on the

truck, to which he answered that he had "what you are looking for." Informed that "We are looking for liquor," Evans replied, "Well, I have got it." The agents then looked into the truck and found approximately thirty cases of whiskey under a tarpaulin. Evans and Feezell were then arrested. On being asked whether he had any whiskey in the Buick coupe, Von Patzoll, who had been arrested a short time before the conversation with Evans and the finding of the whiskey in the truck, voluntarily delivered a fifth-gallon to the agents. (R. 21–22.) Brandon was apprehended a short while later as he was driving toward the scene of his companions' arrest. No liquor was found in the vehicle in which he had arrived at Moore. (R. 30.)

ARGUMENT

1. Petitioners' contention that the seizure of the whiskey in the truck was in violation of the Fourth Amendment because it was effected without a warrant and not based on probable cause (Pet. 2, 8, 11–22) is clearly without merit. The agents' observations preceding their stopping of the truck, together with Evans' admission to the agents, prior to his arrest, that he had liquor on the truck, obviously constituted sufficient basis for the search. *Husty* v. *United States*, 282 U. S. 694, 700–701; *Carroll* v. *United States*, 267 U. S. 132, 147–162; *Morgan* v. *United States*, 159 F. 2d 85, 86–87 (C. C. A. 10).

2. Effective April 24, 1947, while petitioners' appeals were pending in the circuit court of appeals (see R. 15, 56–58), §§ 41–48 of Title 37 of the Oklahoma Statutes were repealed (*supra*, pp. 4–5). The repealed sections had made it unlawful to import intoxicating liquor containing more than 4 percent of alcohol by volume into Oklahoma without a permit (*supra*, p. 4). Thus, in conjunction with Title 37, § 1 (*supra*, pp. 3–4), whereby sales of intoxicating liquor in Oklahoma were and still are prohibited, the repealed sections had made Section 3 (a) of the Federal Liquor Enforcement Act (*supra*, p. 3), on which the information in this case was based, applicable to transportations of intoxicating liquor into Oklahoma. Compare *Dunn* v. *United States*, 98 F. 2d 119, 120–121 (C. C. A. 10), with *Tucker* v. *United States*, 123 F. 2d 280 (C. C. A. 10). Consequently, the federal act has not applied to transportations of liquor into Oklahoma since April 24, 1947. See *Dunn* v. *United States*, *supra*. Petitioners contend that notwithstanding that the offense charged in the information, as well as their convictions, occurred prior to April 24, 1947, the termination of the applicability of the federal act to transportations of liquor into Oklahoma on that date necessitated a setting aside of their convictions by the court below (Pet. 2, 8–9, 23–29). The contention is without merit.

Even if the federal act itself had been repealed subsequent to petitioners' violation of it, the re-

peal would not, of course, have barred their prosecution, much less affected the validity of their convictions, in the absence of an express provision in the repealing act extinguishing previously incurred liability. See 1 U. S. C. 29. But the federal act is still in full force and effect. It is true, as the court below observed (R. 55), that "the existence of the requisite prohibitory laws of Oklahoma is a factual ingredient of the Federal offense with respect to importations into Oklahoma." But that factual ingredient, while it has not existed since April 24, 1947, did exist when petitioners' offense was committed. Consequently, Oklahoma's repeal in April 1947 of her laws prohibiting the importation of intoxicating liquor without a permit, as the court below further observed (*ibid.*), "merely brought to an end a continuing fact which is an essential factual element of the Federal offense. Since the facts essential to the Federal offense were present at the time that offense was committed, the subsequent repeal of the Oklahoma statute does not bar the Federal prosecution."

United States v. *Chambers,* 291 U. S. 217, relied on by petitioners (Pet. 26–29), held that the repeal of the Eighteenth Amendment deprived the National Prohibition Act of all vitality, so that prosecutions under that Act commenced before repeal, including those in the appellate stage, automatically expired. But that decision

is clearly distinguishable from the present case, since the repeal of a state law forming merely a factual element of an offense under a federal statute is in no substantial sense analogous to the repeal of the federal constitutional provision from which a federal statute derives its entire authority and validity.

3. Petitioners, as we have stated, were acquitted on count 1, charging transportation of the liquor in question, and convicted on count 2, charging them with assisting in the transportation. They contend that the evidence does not sustain their conviction on the assisting count (Pet. 29–34).

The theory of the circuit court of appeals was that the proof did not show who transported the liquor from Dallas, Texas, to Davis, Oklahoma, in its trip across the state line,[2] but that the movement was a continuous journey from Dallas to the point of seizure near Moore, Oklahoma; that petitioners Evans and Feezell assisted in the

[2] The proof, however, indicates that Evans transported the liquor from Dallas to Davis. It shows that the agents never let the truck out of their sight from the time it left Dallas until its arrival in Moore, Oklahoma, and that Evans was alone in the truck when it reached Moore. Agent Mogridge testified that the truck stopped en route at Davis, Oklahoma, where the driver "got some coffee," but he did not expressly identify the driver as of that time. Agent Pauly, however, did expressly identify the driver as of that time as Evans and testified that he was "by himself in the truck." (*Supra*, pp. 6–7.)

movement of the liquor in Oklahoma from Davis to the place of seizure; and that under the evidence the district court was warranted in finding that petitioners Von Patzoll and Brandon were interested in the transportation and induced or procured Feezell and Evans to assist therein, and thus was justified in adjudging them guilty as principals (R. 53–54). The court distinguished its prior decision in *Morgan* v. *United States,* 159 F. 2d 85, on the ground that "There was a total absence of proof that the transportation by Morgan was a part of the transportation from Fort Worth into Oklahoma. For aught that appears, the transportation into Oklahoma may have been completed and the whiskey come to rest in Oklahoma before it was transported in Oklahoma by Morgan." The dissenting judge was of the opinion that the instant case was indistinguishable from the *Morgan* case because the evidence showed that petitioners, acting together and in concert as principals, transported the liquor, so that there was no basis for concluding that some other person actually transported the liquor and that petitioners merely assisted him in so doing (R. 56).

We have no quarrel with the dissenting judge's view that the evidence would have supported petitioners' convictions on the transporting count, but only with his assumption that one cannot, under any circumstances, be guilty of assisting

in the transportation of liquor across a state line if he did the transporting or was legally responsible for it. This, we submit, is too legalistic an approach in a case such as this where the evidence shows activity by each petitioner which did, in fact, assist or further a forbidden transportation for which each could also have properly been held responsible. In the instant case, the movement of the liquor was not a continuous, unbroken one from the liquor store in Dallas where it was purchased to the point of seizure near Moore, Oklahoma. The truck on which it was loaded did not pick it up at the liquor store but at a filling station some distance away. The liquor had to be moved from the store to the place where the truck was loaded. While Evans was apparently the one who physically drove the truck from the filling station in Dallas to the place where the liquor was seized in Oklahoma, the proof shows that all of the petitioners, including Evans, were parties to the preliminary maneuverings whereby the liquor was moved from the liquor store to the point where it was loaded on the truck. And the assistance of Evans' associates in the transporting of the liquor did not terminate after the liquor left the Dallas filling station. Their intimate contact, at 4 o'clock in the morning, with the final phase of the interstate journey of the liquor-laden truck is consistent only with the view that they were assisting in the transportation of the liquor. There can be no

doubt that while all of the petitioners were in one way or another interested in the transportation of the liquor across the state line and hence were responsible for such transportation and could, appropriately, have been convicted under the transportation count itself, the evidence did show acts on the part of each petitioner which properly may be considered as "assisting" in the transportation of the liquor from the place of purchase to the place of seizure. Petitioners clearly have no cause for complaint because they were convicted only of assisting in the transportation rather than for the transportation itself. The evidence justified the convictions, and there is presented no problem of sentences for both transportation and assisting therein.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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